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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

TONI RADYS,

Defendant and Appellant.

2d Crim. No. B208010  
(Super. Ct. No. 2007039455)  
(Ventura County)

Toni Radys was granted probation after pleading guilty to theft from an elder adult (Pen. Code, § 368, subd. (e))<sup>1</sup> with a \$150,000 taking enhancement (§ 12022.6, subd. (a)(2)), insurance fraud (§ 550, subd. (b)(3)), grand theft by embezzlement (§ 487, subd. (a)), forgery from an elder adult by a caretaker (§ 368, subd. (e)), and mental abuse of an elder adult (§ 368, subd. (b)(1)). The victim in each count was appellant's 81 year old mother.

Appellant appeals from the order granting probation, contending that she was denied the right to bring a motion to withdraw the plea and assistance of counsel in bringing such a motion. (§ 1018.) We affirm.

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<sup>1</sup> All statutory references are to the Penal Code.

### *Procedural History*

On January 15, 2008, appellant and her attorney, Deputy Public Defender Gay Zide, negotiated a change of plea. The plea agreement provided that the maximum sentence was nine years eight months, that 10 counts would be dismissed, and that appellant would pay restitution and be offered probation.

On March 4, 2008, before sentencing, Zide declared a conflict because appellant wanted to withdraw her plea. The trial court appointed Conflict Defense Associate Kristi Peariso as substitute counsel. Attorney Peariso reviewed the record, consulted appellant, and determined there was no good cause to withdraw the plea.

On April 4, 2008, Zide asked to be reappointed. The trial court denied the request because Peariso had been appointed to represent appellant for all purposes. Appellant would not consent to a substitution or permit Zide to represent her for sentencing.

The trial court denied a continuance request and took a recess. When the matter was called for sentencing, appellant changed her mind and wanted Zide "to handle the sentencing." Zide was reappointed and argued probation and restitution terms. Pursuant to the negotiated plea, the trial court suspended imposition of sentence and granted 60 months probation.<sup>2</sup>

### *Motion to Withdraw Plea*

Appellant claims that she was denied the right to bring a motion to withdraw the plea and the right to assistance of counsel in bringing such a motion. (See *People v. Osorio* (1987) 194 Cal.App.3d 183, 188-189; *People v. Brown* (1986) 179 Cal.App.3d 207, 216.) We reject the argument because appellant was represented at all times and decided not to bring a motion to withdraw the plea. The cases cited by appellant are inapposite and

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<sup>2</sup> Appellant was ordered to pay a \$800 fine to the State Restitution Fund, a \$287 Criminal Justice Administrative Fee, \$19,664.73 restitution to the victim (appellant's mother), \$400 to the State Domestic Violence Fund, attend domestic violence classes, pay \$100 each to three domestic violence shelters, execute a quitclaim deed to the victim's real property, and remove the victim's name from a mortgage on another property.

involve ineffective assistance of counsel claims in which the trial court failed to conduct a *Marsden* hearing (*People v. Marsden* (1970) 2 Cal.3d 118) or appoint substitute counsel. (*People v. Earp* (2008) 160 Cal.App.4th 1223, 1226-1227 [claim that counsel misled defendant into entering change of plea]; *People v. Eastman*, (2007) 146 Cal.App.4th 688, 697 [claim that counsel tricked defendant]; *People v. Smith* (1993) 6 Cal.4th 684, 687 [claim that counsel pressured defendant into pleading guilty]; *People v. Osorio, supra*, 194 Cal.App.3d at pp. 188-189 [counsel acknowledged grounds for filing motion to withdraw plea but refused to do so; substitute counsel not appointed] *People v. Brown, supra*, 179 Cal.App.3d at p. 216 [counsel refused to speak to defendant about motion to withdraw plea; substitute counsel not appointed].)

In *People v. Eastman, supra*, 146 Cal.App.4th 688, defendant pled no contest to two counts of child molestation in exchange for a 10 year prison sentence. Before sentencing, defendant complained that his court appointed attorney had tricked him into entering the change of plea. The trial court-appointed a second attorney to investigate. After the second attorney reported that there was no grounds to withdraw the plea, the trial court sentenced defendant to the stipulated term. (*Id.*, at p. 695.) The Court of Appeal conditionally reversed, holding that the trial court erred in not conducting a *Marsden* hearing. (*Id.*, at p. 698.)

Unlike *Eastman*, appellant did not claim that she was tricked or not receiving effective assistance of counsel. The record is silent on why Deputy Public Defender Zide declared a conflict, but one could surmise that Zide believed a motion to withdraw the plea would be frivolous. (See *People v. Brown, supra*, 179 Cal.App.3d at p. 216 [counsel not required "to make a motion which, in counsel's good faith opinion, is frivolous"]; *People v. Eastman, supra*, 146 Cal.App.4th at p. 699 [substitute counsel not required to make groundless motion to withdraw plea].)

After substitute counsel (Peariso) was appointed and advised the trial court there was no grounds to withdraw the plea, appellant changed tactics and requested that Public Defender Zide be reappointed for sentencing. The trial court reasonably concluded

that it would be nonsensical to appoint a third attorney to explore grounds for withdrawing the plea.

In *People v. Smith* (1993) 6 Cal.4th 684, our Supreme Court stressed that substitute counsel should not be appointed without a proper showing and criticized the procedure of appointing successive attorneys. (*Id.*, at p. 695.) "The spectacle of a series of attorneys appointed at public expense whose sole job, or at least a major portion of whose job, is to claim the previous attorney was, or previous attorneys were, incompetent discredits the legal profession and judicial system, often with little benefit in protecting a defendant's legitimate interests." (*Ibid.*)

The same principle applies here. At the sentencing hearing, the trial court confirmed that appellant had entered the change of plea freely, voluntarily and knowingly. With respect to appellant's on-and-off relationship with Deputy Public Defender Zide, the trial court noted that appellant refused to consent to Zide's substitution earlier that day to "buy her a delay in the sentencing, and since that didn't work, now she wants to go back to the public defender." The trial court speculated that it might be "buyer's remorse" and warned that appellant would have to comply with probation. "I'm not negotiating with you here. I'm offering to place you on probation on the terms outlined by the probation officer. It's up to you whether you accept probation on these terms or not."<sup>3</sup>

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<sup>3</sup> Appellant thought the plea was for 36 months probation but the trial court made it clear that probation would be 60 months. Appellant stated that she understood and accepted the probation terms.

At the conclusion of the sentencing hearing, appellant objected to restitution and requested restitution be stayed. The trial court denied the request and asked if appellant had any questions:

"THE DEFENDANT: So far I feel like I've been given no consideration in this action, and I think that my – the points that I have made are justified.

"THE COURT: That's not a question. Do you have any questions?

"THE DEFENDANT: I guess why?

"THE COURT" Why?

Appellant had the final word. She did not claim that she was denied effective assistance of counsel, that she disagreed with her second attorney (Peariso), or that she wanted to withdraw her plea. We reject the argument that appellant could demand reappointment of her first attorney, accept probation, and on appeal, claim that she was still contemplating a motion to withdraw the plea. "Postplea apprehension (buyer's remorse) regarding the anticipated sentence, even if it occurs well before sentencing, is not sufficient to compel the exercise of judicial discretion to permit withdrawal of the plea of guilty. [Citation.] Moreover, where two conflicting inferences may be drawn from the evidence, it is the reviewing court's duty to adopt the one supporting the challenged order. [Citation.]" (*People v. Knight* (1987) 194 Cal.App.3d 337, 344.)

*Wende Hearing*

Appellant argues that the judgment should be reversed and remanded for further hearing, similar to *Wende* review (*People v. Wende* (1979) 25 Cal.3d 436), to determine whether she has grounds to bring a motion to withdraw the plea. Appellant, by her statements and conduct, decided not to bring a motion to withdraw the plea and accept probation. Unlike the *Eastman* case, there are no grounds to conditionally reverse and remand for a *Marsden* hearing. (See *People v. Eastman, supra*, 146 Cal.App.4th at p. 697.)

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

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"THE DEFENDANT: Mm-hmm. I don't feel like my rights are being defended.

"THE COURT: I guess I should have said do you have any nonrhetorical questions?

"THE DEFENDANT: No, I don't."

James P. Cloninger, Judge  
Superior Court County of Ventura

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